

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT) (Insolvency) No. 1490 of 2024

[Arising out of Order dated 18.01.2024 passed by the Adjudicating Authority (National Company Law Tribunal), Court II, Mumbai Bench in MA No. 1847 of 2019 in C.P. (IB) No. 1514(MB)/2017]

In the matter of:

Rakesh J Shah & Ors.

...Appellants

Vs.

Sanjay Kumar Agarwal & Ors.

...Respondents

For Appellants: Mr. Bishwajit Dubey, Mr. Anuj Tiwari, Mr. Kaustaubh Rai, Mr. Karan Khetani, Mr. Vinay Patil, Mr. Girijapati Kaushal. Ms. Aroshi Pal and Ms. Monika, Advocates.

For Respondents: Ms. Yahya Batatawala, Advocate for R1.

**JUDGMENT
(22nd November, 2024)**

Ashok Bhushan, J.

This Appeal has been filed challenging the order dated 18.01.2024 passed by the Adjudicating Authority (National Company Law Tribunal), Court II, Mumbai Bench in M.A No.1847 of 2019 in Company Petition (IB) No. 1514(MB)/2017. The Appellant's M.A. No.1847 of 2019 challenging the decision of the liquidator has been rejected.

2. Brief facts of the case necessary to be noticed for deciding the Appeal are:-

2.1. The CIRP of the Corporate Debtor commenced vide order dated 01.01.2018 passed by the Adjudicating Authority on an application filed

under Section 7 by the Allahabad Bank against the Corporate Debtor- 'Biator Industries Ltd.'. On an application filed by the Resolution Professional, an order dated 31.12.2018 was passed by the Adjudicating Authority directing for liquidation of the corporate debtor. Liquidator made publication inviting claims from the stakeholders. The Appellants in their capacity as Authorised Representative of 271 workmen submitted their claims in Form F vide e-mail dated 07.02.2019. Liquidator vide e-mail dated 25.02.2019 asked the Appellants to submit the proof of employment in the company in the period of two years preceding the liquidation commencement date in order to admit their claims. The liquidator vide e-mail dated 02.03.2019 communicated the rejection of the claims. Aggrieved by the rejection of the claims by the liquidator, Appellant filed MA No.1847 of 2019 before the Adjudicating Authority. Liquidator filed an Affidavit-in-reply dated 17.06.2019. Appellants filed an application on 26.06.2019 bringing on record certain additional documents. Adjudicating Authority after hearing the Appellants as well as the liquidator has passed the impugned order rejecting the claims. Appellants aggrieved by the said order has come up in this Appeal.

3. Shri Bishwajit Dubey, Learned Counsel for the Appellant in support of the Appeal contends that even though the corporate debtor has ceased to do business from June, 2010, the closure of factory was not in compliance with the provisions of the Industrial Dispute Act, 1947. The workmen shall be deemed to be continuing and entitled for all benefits including wages till the date of commencement of liquidation. Counsel for the Appellants referring to Section 25(o)(6) of the Industrial Dispute Act 1947 submits that no approval

have been taken by the corporate debtor from the State Government which is required for closing a factory. There is no closure in the eyes of law and workmen are entitled to wages as if they are working. Liquidator has wrongly restricted the look back period to two years preceding the liquidation commencement date. Workmen are to be treated as employees of the corporate debtor and no salary slip was required to be proved by the Appellants. Adjudicating Authority also erred in observing that the Appellants has not given sufficient reason for filing the application with delay of 25 days. Workmen have been continuously working up till April 2012 from which date they have been denied entry inside the factory by the security guards.

4. Counsel for the liquidator refuting the submissions of the Counsel for the Appellants submits that the liquidator has to satisfy himself regarding the claims filed by the workman. Liquidator was fully entitled to call for evidence for substantiating the claims of the Appellants. It is submitted that the factory ceased to work from June, 2010 and according to own case of the Appellant, they have not worked in the factory from April 2012. Liquidation Commencement Date being 31.12.2019, there is no material submitted before the liquidator to establish that the workmen on whose behalf the claims were filed were in the employment on the date of commencement of the liquidation. There being own case of the Appellant that they have not worked from 12.04.2012, liquidator asked for documents/evidence to substantiate the claims in response to which only certain identity cards and pay slips for the year 2010 has been submitted which are insufficient to accept the claims as submitted by the Appellants. Insofar as the submissions of the Appellants

alleging violation of the provisions of the Industrial Dispute Act, 1947, it was open for the workmen to raise dispute and claim under the Industrial Dispute Act which having never been raised, it is not open for the Appellants to claim any entitlement in the liquidation proceedings of the corporate debtor which commenced on 31.12.2018.

5. We have considered the submissions of the Counsel for the parties and perused the record.

6. From the facts brought on the record, it is clear that the corporate debtor ceased to work from June, 2010 and according to the case of the Appellants themselves, they worked in the factory till April 2012 only. The claim was filed by the Appellants who were asked by the liquidator to submit evidence to substantiate the claims. No satisfactory evidence having been produced by the Appellant that they were in the employment of the corporate debtor on the date of commencement of the liquidation, the Liquidator rejected the claims and sent communication dated 02.03.2019 which is as follows:-

“Therefore, with regards to the dues of workmen and employees, the IBC allows only for dues upto a period of two year/one year prior to the liquidation commencement date to be distributed from the proceeds of sale of assets of the corporate debtor.

In the present case, we have been given to understand that while the Corporate Debtor has ceased business operations since June 2010, certain employees and workmen have claimed dues till December 31, 2018.

However, in view of the above section, the workmen and the employees of the Corporate Debtor may not be able to claim from the proceeds of the sale of assets and the same may not be admitted.

Considering the above facts of law, your claim in M/s Biotor Industries Ltd has been rejected."

7. From the claims which were filed by the Appellants, it is clear that they have claimed dues till 31.12.2018. After communication received from the liquidator, Appellants filed MA No.1847 of 2019 challenging the order of liquidator. Following prayers were made in M.A No. 1847 of 2019:

"a) That the Applicants may be made a party in Company IB No. 154 of 2017.

b) The Opponents be directed to recall its Order dated 2nd March 2019 and that this Tribunal may direct him to consider and pay the dues of the workmen which was submitted to him earlier in Form "F".

c) That the Order of the Opponent dated 3rd March 2019 be quashed.

d) The Opponent be directed to consider the Claim of the Applicants and the workmen whose list was filed before him afresh in line with the value of this Honourable Court.

e) In the alternative this Honourable Tribunal may permit the Applicants to make their claim before this Honourable

Tribunal and in respect of unpaid Provident Fund, Pension and Gratuity and other legal dues.

f) cost of the Application be provided for

g) Any other reliefs be granted.”

8. The Adjudicating Authority heard the parties and by impugned order has rejected the application. Adjudicating Authority in the impugned order has noted submissions of the Appellants where they claimed entitlement of the wages till 31.12.2018 on the ground that permission of the State Government was required for closing down the factory and no such permission has been taken. The workmen are entitled to all the benefits under the law. The submission advanced by the Counsel for the Appellant has been noticed in paragraph 3(iv) which is to the following effect:-

“iv. Under section 25(o) (7) of the Industrial Dispute Act, 1947 permission of the State Government is required for closing down a factory/company employing more than 100 workmen. In the instant case, admittedly more than 100 employees are employed and no permission is granted by the State Government to close down the Corporate Debtor. Section 25(o)(7) further states that if the permission is refused, then the workmen shall be entitled to all the benefits under the law. Thus, the Applicants submit that as long as there is no compliance of Section 25(o) of the Industrial Disputes Act, 1947 there is no closure in the eyes of law and the employees who were ready and willing to work, the workmen are entitled to wages as if they are working. In the present case, since there is no closure

in the eyes of the law and all the workmen have been reporting for work, they are to be treated as working till date and consequently, all the workers are entitled to wages.”

9. The Adjudicating Authority, after hearing the parties, has noted submission of the Applicants/Appellants that they have been continuously working till April, 2012 whereafter they have been denied entry inside the factory. In paragraph 8 of the impugned order, following has been observed:-

“8. Counsel for the Applicant has submitted that the workmen have been continuously working up till April, 2012 and they have been denied entry inside the factory by the security guards, though the workers were reporting every day. Therefore, even according to the Applicants, the workmen have been working up till April, 2012 and there is nothing on record to show that the workmen have agitated or asserted their labour rights by exercising the remedies available to them under the labour welfare legislations such as the Factories Act, 1948, the Industrial Disputes Act, 1947, etc. Hence, it seems that the workers/employees have slept over their rights for years together and have woken up all of a sudden out of their slumber only when the Corporate Debtor went into CIRP and eventually into liquidation. 'Vigilantibus non dormientibus jura subveniunt' is a well settled proposition of law which means that the law comes to the aid of those who are vigilant and not the indolent, who sleep over their rights. This legal doctrine underscores the importance of asserting one's rights in

a timely manner rather than belatedly seeking recourse.”

10. The Adjudicating Authority also noted in the order that Applicants had relied upon the I-Cards and Pay Slip of 2010 while submitting claims in Form F. Paragraphs 9 and 10 of the impugned order are as follows:-

“9. Under Regulation 19(3) of the IBBI (Liquidation Process) Regulations, 2016, the existence of dues to workmen or employees may be proved by them, individually or collectively, on the basis of (a) records available in the information utility, if any; or (b) other relevant documents which adequately establish their dues including any or all of the following- (i) a proof of employment such as contract of employment for the period for which such workman or employee is claiming dues; (ii) evidence of notice payment of unpaid amount and any document or other proof that payment has not been made; and (iii) an order of a Court or Tribunal that has adjudicated upon the non-payment of dues, if any. However, in the present matter, there is no satisfactory evidence on record to show the existence of dues. The Applicants have relied upon I-Card and Pay-Slips of 2010 while submitting their claims in Form 'F' before the Respondent, which, in our considered view, do not adequately establish the dues to the workman for the period stipulated therein.

10. The Applicants while filing the claim in Form 'F' had relied upon the I-Cards and Pay Slip of some month in the year 2010. The Applicants while submitting Form 'F' have claimed the dues of workmen from November, 2010 onwards. This implies that the workmen have not

been paid since November 2010. However, it is very hard to believe that the Applicants and the workmen whom they purportedly represent, worked unpaid at the factories of the Corporate Debtor from November, 2010 until April, 2012 and even thereafter, without raising any industrial dispute or agitating for their rights or asserting the same before the Labour courts/Industrial Tribunal or any other competent legal forum. There is also no document on record to show that the workmen/employees or the Applicants herein had served any notice upon the Corporate Debtor demanding the payment of unpaid wages/salaries. There is further not an iota of evidence to show that at any point of time subsequent to 2010 or 2012, the Applicants approached the Labour Court/Industrial Tribunal to seek redressal of their grievances that their dues from the year 2010 onwards were not being paid or that they were wrongfully and illegally being prevented from entering the factory premises despite the fact that the factory was never legally closed as per the relevant laws. In the absence of any such evidence, it would be quite arduous to believe and hold that the Applicants have been working throughout from 2010/2012 onwards without being paid.”

11. The submission which has been pressed before us by the Counsel for the Appellants is that the closure of the factory is not in accordance with the provisions of the Industrial Dispute Act, 1947 since no permission from the State Government was taken for closure. The workmen are to be treated to be entitled to all benefits under any law for the time being in force as if it had

not been closed down. Reliance has been placed on Section 25-O(6) of the Industrial Dispute Act, 1947 which is as follows: -

“25-O. Procedure for closing down an undertaking.-- (6) *Where no application for permission under sub-section (1) is made within the period specified therein, or where the permission for closure has been refused, the closure of the undertaking shall be deemed to be illegal from the date of closure and the workmen shall be entitled to all the benefits under any law for the time being in force as if the undertaking had not been closed down.”*

12. In the present case, according to own case of the Appellants that they could not work after April, 2012. They had not taken any proceedings before the Industrial Court or Labour Court for their wages and other claims. For violation of provisions of the Industrial Disputes Act, 1947, the remedy available to the workmen was to approach the Industrial Court or Labour Court. Adjudicating Authority has rightly observed that the workmen/employees have slept over their rights for years together and they filed the claim only when CIRP/ liquidation has commenced. Observations of the Adjudicating Authority as made in paragraph 8 has already been extracted above.

13. The NCLT. while exercising its jurisdiction on the liquidation process of the corporate debtor is not entitled to enter into issue as to whether the closure of the factory from June 2010 was in violation of the Industrial Dispute Act, 1947. The said issue ought to have been raised by the Appellants before the Industrial Court or Labour Court.

14. In the above context, we may refer to the judgment of this Tribunal in **“Era Labourer Union of Sidcul, Pant Nagar, through its Secretary vs. Apex Buildsys Ltd.- Company Appeal (AT) (Insolvency) No. 1572 of 2024”** decided on 20.09.2024. In the above case also, labourer union of Sidcul, Pant Nagar had filed a claim in the CIRP of the corporate debtor which commenced on 20.08.2018. Direction for liquidation was also passed by the Adjudicating Authority on 09.01.2020. Before the Adjudicating Authority, IA was filed by Era Labourer Union where declaration of the lockout on 31.07.2017 was under challenge and Appellant claimed for payment from date of the lockout till the commencement of the liquidation proceedings. The liquidator had not accepted the claim from date of lockout till the commencement of the CIRP. The claims of the Claimants were not verified from the date of closure. Adjudicating Authority rejected the application of the Labourer Union questioning the layoff. Challenging the said order, the appeal was filed. In the above case, the Labourer Union had filed Writ Petition before the High Court of Uttarakhand as well as before the Hon’ble Supreme Court. High Court noticing the commencement of CIRP directed the Appellant to approach the NCLT. Hon’ble Supreme Court did not entertain the Writ Petition noticing that the insolvency proceedings are pending before the NCLT. It was contended by the Appellant in the above Appeal that the Adjudicating Authority was fully competent to decide the issue regarding closure/lockout. This Tribunal affirmed the view of the Adjudicating Authority that it has no jurisdiction to challenge the closure notice. In paragraph 19 of the judgment, following has been observed:-

“19. From the facts of the above case, it is clear that the closure/lockout notice which was issued on 31.07.2017 much prior to initiation of the CIRP and the closure and lockout notice was nothing to do with the CIRP process. Challenge to the closure and lockout notice cannot be raised before the Adjudicating Authority who is not competent to adjudicate the said issue which arises out of the provision of the Uttar Pradesh Industrial Disputes Act, 1947. Hence, we are of the view that the Adjudicating Authority did not commit any error in not entertaining the challenge to the closure notice dated 31.07.2017.”

15. After hearing the parties and noticing the judgments relied by the Appellant, in paragraph 29, following was held by this Tribunal:-

“29. In view of the foregoing discussions, we are of the view that no error has been committed by the Adjudicating Authority in rejecting the IA No. 2545 of 2021 filed by the Appellant where Appellant has sought to challenge the closure dated 31.07.2017 and transfer order dated 20.06.2017. Insofar as the claims of the Appellant, the liquidator has accepted the claim. Non verification of the claim subsequent to 31.07.2017 when the Pant Nagar factory remain closed cannot be interfered with by this Tribunal in the present Appeal. We, thus, do not find any merit in the Appeal. The Appeal is dismissed.”

16. The above judgment fully supports the submission of the Liquidator that the issue of closure of the factory from June, 2010 cannot be questioned and the issue which ought to have been raised by the Appellants before the

Industrial Court or Labour Court. Before the liquidator, no material having brought by the Appellants to prove their employment and working till 31.12.2018, the Liquidator did not commit any error in rejecting the claims. Adjudicating Authority after considering all submissions of the parties has rightly dismissed the M.A. No. 1847 of 2019.

17. We do not find any infirmity in the order of the Adjudicating Authority warranting interference by this Tribunal in exercise of Appellate Jurisdiction. There is no merit in the Appeal. The Appeal is dismissed.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

**[Arun Baroka]
Member (Technical)**

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Anjali